APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

File No. BMPCT-5738

In re Application of

NEW ORLEANS TELEVISION CORPORATION (WVUA-TV)
New Orleans, Louisiana

For Modification of Construction Permit

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Lee dissenting and issuing a statement.

1. The Commission has before it for consideration (a) a "Petition to Designate For Hearing Or For Other Relief" filed on May 8, 1962 by St. Anthony Television Corporation (St. Anthony), permittee of Television Broadcast Station KHMA, Channel 11, Houma, Louisiana, directed against the above-captioned application of New Orleans Television Corporation (applicant), permittee of Television Broadcast Station WVUA-TV, Channel 12, New Orleans, Louisiana; (b) a "Petition to Deny" filed on May 11, 1962 by Capitol Broadcasting Company (Capitol), licensee of Television Broadcast Station WJTV, Channel 12, Jackson, Mississippi, directed against a grant of the above-captioned application; (c) "Objections of Association of Maximum Service Telecasters, Inc. to Grant" filed on May 11, 1962, directed against the above-captioned application; (d) a "Motion to Strike and Response To Objections of Association of Maximum Service Telecasters, Inc." filed on May 21, 1962 by applicant; (e) an "Opposition to Petition to Designate For Hearing" filed on May 21, 1962 by applicant; (f) an "Opposition To Petition To Deny" filed on May 24, 1962 by applicant; (g) an "Opposition To Motion To Strike And Reply To WVUA-TV" filed on June 1,

1962, by Association of Maximum Service Telecasters, Inc.; and (h) a "Reply To Opposition To Petition To Deny" filed on June 4, 1962 by Capitol Broadcasting Company.

2. On April 3, 1962[1], the applicant filed its application (BMPCT-5738) for modification of construction permit to decrease visual effective radiated power from 316 kw to 136.8 kw[2]; change studio location; change transmitter location from Socola, Louisiana to Paris Road near Back Protection Levee, east of Chalmette, Louisiana; change type of transmitter; change type of antenna; make other changes in equipment, and decrease antenna height above average terrain from 1320 feet to 1010 feet. In net effect, this application proposes to move the presently authorized site of Station WVUA-TV in the direction of New Orleans, to a site which is approximately 160 miles from the licensed site of Station WJTV, Channel 12, Jackson, Mississippi. Since this separation is less than the 190 miles required by Section 3.610 of the Commission's Rules, the applicant proposes to limit its radiated power in the direction of Station WJTV in order to provide "equivalent protection" to Station WJTV, as provided for in the Commission's Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a.

3. St. Anthony Television Corporation, Capitol Broadcasting Company, and Association of Maximum Service Telecasters, Inc. (AMST) each oppose a grant of the present application. The standing of the first two parties has not been challenged; however, applicant has moved to strike the objections of AMST on the ground that it is not a "party in interest" in this proceeding. AMST has responded that its objections are filed pursuant to Section 1.361(a) of the Commission's Rules which allows "any person" to file objections to an application and, further,

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[1] Minor amendments to the application were filed July 5, 1962 but do not vary the problems discussed.

[2] Since a directional antenna is being employed, 316 kw will be furnished in the major lobe.

that in its Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a, the Commission specifically provided that "interested parties may respond to the application" when a short-spaced application for Channel 12 in New Orleans was subsequently filed. Under these circumstances, and in view of the intimate interrelationship between the present proceeding and our previous conclusion in Docket No. 13340, we believe it appropriate to allow the limited participation sought by AMST.

4. For our action on the present application to be seen in proper perspective, it is necessary to recapitulate briefly the relevant history of the proceedings in Docket No. 13340. The Commission has been increasingly aware of the stark fact that the VHF channels presently available for assignment are insufficient to provide for a nationwide competitive television system. As a consequence of this shortage, the Commission has been faced with severe practical problems in the implementation of its associated long-term policy of fostering the development of at least three competitive television networks since, in too many markets, it has been impossible to assign a competitive third commercial VHF channel. The Commission's inability to make such assignments has, in turn, had the effect of partially blocking its efforts in developing three competitive networks. With this problem in view, the Commission instituted rulemaking in Docket No. 13340 in an effort to find a palliative which could serve to alleviate the critical need for additional channels in selected major markets in the interim period before full utilization of the UHF channels could be achieved[3]. As a result of the proceedings

[3] A significant development in this direction has been enactment of "all-channel receiver" legislation on July 10, 1962. In part, this legislation authorizes the Commission to require that all sets shipped in interstate commerce be capable of receiving UHF signals and, over a period of years, should provide a foundation for expansion in UHF as the chronic set conversion problem is dissipated.

in Docket No. 13340, the Commission concluded that the most efficient means of accomplishing its purpose would be to permit channel assignments at substandard spacings subject to the requirement that the new stations provide protection, in a manner specified by the Commission, to existing stations to assure that they not receive radiation in excess of the amount they are obligated to accept from a co-channel station operating with maximum facilities at full mileage separation. In view of the limitations inherent in such a technique, which necessarily limits its use only to exceptional cases, the Commission did not amend the minimum spacing requirements of Section 3.610 of the Commission's Rules, but a group of markets in which use of the "squeeze in" procedure would be considered. These markets conformed to the standards stated by the Commission in its Report and Order of July 27, 1961, in Docket No. 13340, *Interim Policy on VHF Television Channel Assignments*, 21 R.R. 1695, 1698, paragraph 11.

5. In its Memorandum Opinion and Order of December 6, 1961 in Docket No. 13340, 21 R.R. 1710a, issued in response to petitions for reconsideration, the Commission determined that New Orleans would be added to its select list of communities in which the pressing need for additional facilities justified further consideration of the "squeeze in" technique. As the Commission explained,

> "... Although Channel 12 is assigned to New Orleans it is persuasively argued that this factor presents no substantial reason why New Orleans should be treated differently than the other named cities since the station is not yet built ...
>
> "... Channel 12 may now be utilized at the required 190 miles separation to co-channel station WJTV, Jackson, Mississippi, and, under our rules, provide a signal of required strength to the city of New Orleans. Nevertheless, the Commission is of the opinion that considering the size of the market, the objective of this proceeding to strengthen nationwide competitive television, and the less than optimum benefits to be derived

from the use of Channel 12, 35 miles from the city, there is sufficient warrant to consider use of the channel at short spacing with equivalent protection provided to WJTV."

Interim Policy on VHF Television Channel Assignments, 21 R.R. 1710a, 1710f.

Since Channel 12 was already assigned to New Orleans, no further rule-making was required. However, the Commission stated that it would "enteretain an application to modify the outstanding construction permit for Channel 12 and interested parties may respond to the application," *Id.*

6. In support of its present application, the applicant has made an elaborate showing that its application satisfies the Commission's stated criteria, referred to in paragraph 4 above. In the main, the other parties have not taken issue with this contention. However, Capitol has advanced the argument that the status of Channel 12 is outside the scope of the criteria established for Docket 13340, since the Commission earlier excluded "suggestions that existing stations . . . be permitted to move closer in", 21 R.R. 1695, 1699, as being beyond the scope of the proceeding, and that the present application should therefore be dismissed as inconsistent with Docket 13340. This argument is directed to the merits of Docket 13340 and should, it would seem, have been raised in that proceeding by timely filed petition for reconsideration of our action of December 6, 1961. *Skyway Broadcasting Company*, 19 R.R. 1149, 1150. In any event, as we explained in our earlier action, we consider the fact that the Channel 12 station has not been built as sufficient basis to distinguish the instant situation, and, consequently, we herewith reaffirm our earlier determination that the status of New Orleans Channel 12 was properly within the scope of Docket 13340.

7. A variation on the argument discussed in paragraph 6, above is advanced both by AMST and by Capitol as each urges that action on the present application should be de-

ferred pending final action in Docket Nos. 14231-14238, the separate outstanding rule-making proceedings proposing substandard assignments to specific communities deriving from Docket 13340, in order to avoid the risk of prejudgment in those proceedings. This argument ignores the fact that the Commission is already committed to the consideration of the use of substandard spacings in appropriate circumstances to alleviate the critical need for additional VHF assignments in major markets to foster the nationwide competitive television system envisioned by the Commission. Thus, the only problem facing the Commission either here or in the cited dockets is the appropriateness of the proposed solution to the particular factual situations involved, and action in any one specific situation can not, therefore, prejudge the others. There is additional need for dispatch in the present situation since the applicant is temporarily operating on Channel 13, assigned to Biloxi, Mississippi, pending completion of construction of a station to operate on Channel 13 in Biloxi. Since the permittee in Biloxi has indicated that it expects to complete its construction and be ready for operation soon, there is every warrant for a speedy resolution of the present proceeding.

8. A further policy argument advanced by AMST and by Capitol is that the present application should be rejected as a matter of policy in view of the fact that applicant has an authorized site meeting the requirements of the Commission's Rules, notwithstanding the fact that it is located 35 miles from the principal community to be served. Thus, it is urged that there is no need for a grant of the present substandard proposal since applicant can, in any event, furnish a technically satisfactory signal to New Orleans. This argument is obviously entitled to weight, and might even be decisive, if we were concerned only with adjudication of the private rights of the parties. Such is not the case here. The problem with which the Commission grappled in Docket No. 13340 was the fostering of a nationwide competition network situation. To accomplish this

purpose it is necessary to assure the availability of competitive facilities to the networks within the major markets, for the economic ability of a network to survive and furnish the public with the benefits of its operation hinges ultimately on its access to competitive facilities within the major markets. By assuring the existence of a third *competitive* station in New Orleans, the Commission benefits not only the viewing public of that city but, ultimately, the public of the entire nation. We believe that the benefits to be derived from furtherance of this policy justify the use of Channel 12 in New Orleans at substandard spacings. 21 R.R. 1710a, 1710e.

9. AMST and Capitol have attacked the applicant's proposed use of equivalent protection on three grounds. First, both have urged that the failure of the application to specify such matters as the use of a reference antenna shows that the application does not conform to the requirements established in Docket No. 13340. The applicant's responsive pleadings show that it does contemplate the use of such an antenna but that it did not consider it a matter appropriate for inclusion in our standard application form, FCC Form 301. We are mindful of an obligation to assure Capitol that it will receive the full measure of protection to which it is entitled under our decision, and, for this reason, we are adding appropriate conditions, set forth below, which we consider adequate to accomplish this purpose. Moreover, in the event that questions should subsequently arise regarding the applicant's operation, we will direct every effort toward assuring the requisite protection to Capitol. The second objection, advanced by Capitol alone, is that the computation of the mileage separation to which it is entitled is erroneous since it should be based on Zone III standards rather than Zone II standards. Station WJTV lies in Zone II, as defined by Section 3.699 of the Commission's Rules, while New Orleans is in Zone III. Section 3.610(b)(2) of the Rules provides, in relevant part, that "the minimum co-channel mileage separation between a station

in one zone and a station in another zone shall be that of the zone requiring the *lower* separation" (emphasis added). Nonetheless, Capitol argues that since it lies just within Zone II the path over which radiation will be transmitted is exclusively within Zone III and that, therefore, it should be entitled to protection as though it too were a Zone III station. This argument is readily answered. WJTV is by definition a Zone II station. Consequently, it is not entitled to more protection than that being proposed by the applicant, since even if the applicant were to locate in full conformance with the separation requirement, WJTV would still receive the interference against which it is not protected under the present Commission Rules. And it is for this reason that Capitol's reliance on *American Broadcasting Company-Paramount Theatres, Inc. v. Federal Communications Commission*, ___ F.2d ___, 23 R.R. 2020, is misplaced, since interference could have been avoided in that case whereas here a certain amount must result in any event. Third, and last, AMST advances its general view that the Commission's standards of equivalent protection do not in fact provide protection against co-channel interference equivalent to that provided by the mileage separation requirements. This argument, standing unrelated to the particular facts here at issue, is irrelevant since we have already determined, in the abstract, the need for the use of this technique. As we stated in our opinion on reconsideration in Docket No. 13340, in specific response to comments by AMST, "the entire subject of new interference can be thoroughly examined in the individual proceedings," 21 R.R. 1710a, 1710g. However, since AMST has not attempted to make any showing regarding the specific proposal here at issue, we do not believe it either necessary or appropriate to launch on an abstract discussion of a technical engineering matter which has not been directly related to this proceeding.

10. Capitol has further claimed a right to a prior evidentiary hearing pursuant to Section 316 of the Communi-

cations Act. That statutory provision, among other things, requires the Commission to afford licensees an opportunity to demonstrate, in an evidentiary hearing, why an order of modification of a license should not become final. It is the Commission's position, however, that Section 316 should not apply in the present case. Our action in Docket No. 13340 and our action granting the present application would not change either Capitol's facilities or its mode of operating Station WJTV. The other type of situation in which Section 316 rights have been recognized occurs when there is a *de facto* modification of a broadcast license through authorization to another station to radiate signals which create interference to the licensee's service within the area in which it is entitled to protection under the Commission's Rules. Section 3.612 of the Rules requires a television licensee to accept the degree of interference which results from the establishment of a station of maximum antenna height and power at the minimum indicated co-channel separation. Under the conditions imposed on the applicant, Station WJTV will not be required to receive a greater degree of interference from the applicant's proposed station than if it were operating at standard spacing with the full facilities to which it is entitled under the Commission's Rules. In these circumstances, it is clear that a grant of the present application would not modify Station WJTV's license and that, accordingly, it is not entitled to a hearing under Section 316 of the Communications Act. *Amendment of Section 3.606, Table of Assignments, Television Broadcast Stations (Syracuse and Rochester, New York,)*, 21 R.R. 1754, 1761-1762.

11. St. Anthony, permittee of Station KHMA, Houma, Louisiana, objects that the present application falls short[4] of the minimum adjacent channel separation of 60 miles

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[4] Although St. Anthony originally claimed that the separation would be only 52.7 miles, it appears that approximately 55 miles is the correct figure.

established by Section 3.610(c) of the Commission's Rules. Consequently, it asserts its right to a hearing.[5] As an alternative, it proposes that the Commission grant its pending application (BMPCT-5400) for modification of its outstanding construction permit to specify a site at Geismar, Louisiana, which satisfies the adjacent channel separation requirement to applicant's proposed site. However, action on the St. Anthony application is being withheld pending final action in Docket No. 14233 in which reassignment of Channel 11 From Houma to Baton Rouge is proposed. The Commission determined in Docket No. 13340 that equivalent protection would not be extended to adjacent channel stations. St. Anthony has not attacked this conclusion nor has it made any attempt to show the existence of special circumstances or interference conditions which would warrant a hearing on the application. Under these circumstances, we believe it appropriate simply to point out that this matter was effectively settled in Docket No. 13340, 21 R.R. 1699, 1700, 1710g. Aside from this, it is appropriate to note that St. Anthony has held a construction permit since November, 1958, without constructing its proposed station. While it is clear that St. Anthony wishes to pursue various alternatives before settling the question of Station KHMA's site, it is equally clear that St. Anthony has no present intention of constructing, before final settlement of its alternative proposals. Under these circumstances, and in view of St. Anthony's expressed desire to change site, it is clear that it would be futile to grant St. Anthony a hearing which could have but one result. Accord, *L. B. Wilson, Inc.* 20 R.R. 1021, 1022.

12. The voluminous pleadings filed in this proceeding have raised a number of other matters which we do not con-

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[5] AMST has also urged that both Capitol and St. Anthony must be afforded hearings pursuant to Section 316 of the Communications Act. However, although we feel AMST should be allowed to have its objections considered, we do not believe it appropriate here to allow it to assert statutory rights which do not run to it.

sider it necessary to discuss *seriatim* in view of our stated bases for the disposition of the arguments advanced; however, all of these matters were carefully considered. In this connection, although the matter has not been raised by the parties, we believe it appropriate to note that we have carefully weighed the gains and losses of predicted coverage to populations and areas which will result from a grant of the application. We find that there will be a substantial net gain in coverage as a result of the move. In addition, the entire area which would lose a predicted Grade B signal as a result of the move is swampland where few people reside.

13. In view of the foregoing, the Commission concludes that no substantial or material questions of fact have been presented by the pleadings, and that the petitioners have failed to establish that grant of the above-captioned application would be *prima facie* inconsistent with the public interest. The Commission finds further that the requested waiver of Section 3.610(c) of the Rules is warranted and that grant of the above-captioned application would serve the public interest, convenience and necessity.

Accordingly, It Is Ordered, That New Orleans Television Corporation's Motion to Strike AMST's objections, Is Denied; that the requested waiver of Section 3.610(c) of the Rules Is Granted; That the application (BMPCT-5738) of New Orleans Television Corporation Is Granted Subject To The Following Conditions:

1. The construction authorized shall have no adverse effect on the operation of WTIX(AM). Sufficient field strength measurements shall be made before and after construction of the TV antenna to prove that no material effect on the WTIX(AM) operation has resulted.

2. The horizontal effective radiated visual power in the direction of Station WJTV, Jackson, Mississippi, shall not exceed 17.2 dbk(52.5kw).

3. An appropriate reference antenna shall be installed on the main antenna structure for the purpose of making ratio field intensity measurements with the transmitting antenna in the direction of Station WJTV at the time of initial operation and subsequent periodic checks during regular operation. The reference antenna shall be installed in a manner to minimize coupling to the main antenna elements, the tower structure, and guy wires. Provisions shall be made for coupling the transmitter output either to the reference antenna or to the main transmitting antenna and suitable means shall be available for accurately determining and maintaining the relative power inputs to the main and reference antennas.

4. Monitoring locations shall be selected for the purpose of obtaining relative field intensity measurements between the reference and main antenna to establish that the limited radiation specified above in the direction of WJTV is not exceeded. At least two monitoring locations on the radial connecting the WVUA-TV transmitting antenna and Station WJTV shall be selected. Comparative radiation measurements of the WVUA-TV transmitting antenna shall be made during equipment tests and at least once each 90 days at the selected monitoring locations. Records of such measurements shall be maintained and made available to the Commission upon request.

5. Suitable means shall be provided for monitoring the visual power inputs to the two main branches of the main transmitting antenna during normal operation.

6. The application for license shall include the following:

(a) Horizontal plane radiation pattern obtained from measurements performed by the manu-

facturer for the transmitting antenna prior to its installation.

(b) Vertical radiation patterns obtained from measurements by the manufacturer for the transmitting antenna prior to its installation for at least the azimuths toward Station WJTV.

(c) An affidavit by a qualified and licensed surveyor that the proper azimuthal orientation of the transmitting antenna to achieve the radiation limitations prescribed above for Station WJTV was established at the time of the antenna installation.

(d) Description of the reference anter ıa installation with appropriate measured radiation patterns.

(e) Description of monitoring locations on the radial connecting the WVUA-TV transmitting antenna and Station WJTV.

(f) Comparative field intensity measurements obtained during equipment tests between the reference and main antenna at the selected monitoring points together with a description of equipment and technique employed.

(g) Description of means employed to monitor power input to the reference antenna and the relative power inputs to the two main branches of the transmitting antenna together with calibration and sample power measurements.

It Is Further Ordered, That AMST's objections, upon due consideration, Are Denied; that St. Anthony Television Corporation's "Petition to Designate for Hearing or For

Other Relief" Is Denied; and that Capitol Broadcasting Company's "Petition to Deny" Is Denied.

Federal Communications Commission*

Ben F. Waple
Acting Secretary

Adopted: July 25, 1962
Released: July 31, 1962
*See attached dissenting statement of Commissioner Lee.

Dissenting Statement of Commissioner Robert E. Lee

I dissent to the action of the majority in approving the construction of WVUA-TV at a site 30 miles short to a co-channel station and 5 miles short to an adjacent channel station.

It is clear that from the site heretofore authorized, the station places a principal city signal to New Orleans. Accordingly, there is no justification for the instant authorization particularly in view of the violence done to our technical standards.

I fail to see how the Commission intends to preserve VHF service and how it intends to keep UHF stations from jumping onto the bandwagon whereby sub-standard VHF stations apparently are to be made available to everyone possessing other requisite qualifications.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Bastian, Circuit Judge, in Chambers.

ORDER

On consideration of the motions of appellee and intervenor New Orleans Television Corporation, to dismiss the notice of intention to intervene filed by Association of Maximum Service Telecasters, Inc., and of the oppositions thereto filed, it is

ORDERED by the court that the motions be granted and that the notice of intention to intervene of Association of Maximum Service Telecasters, Inc., is hereby dismissed.

Per Curiam.
November 16, 1962

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Bastian, Circuit Judge, in Chambers.

ORDER

On consideration of the petition of Association of Maximum Service Telecasters, Inc., for reconsideration, by the division, of the order entered herein on November 16, 1962, and of the responsible pleadings, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

January 10, 1963

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,258

CAPITOL BROADCASTING COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
NEW ORLEANS TELEVISION CORPORATION, *Intervenor*,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenors*.

Before Bazelon, Chief Judge, and Edgerton, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger and Wright, Circuit Judges, in Chambers

ORDER

On consideration of the petition for reconsideration of Association of Maximum Service Telecasters, Inc., for reconsideration en banc, of the oppositions thereto filed by appellee, and intervenor New Orleans Television Corporation, of appellant's answer to the petition, and of said movant's reply, it is

ORDERED by the court that the aforesaid petition is hereby denied.

Per Curiam.
January 10, 1963

Circuit Judge Wright did not participate in the foregoing order.